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No.

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In The

Supreme Court of the United States

October Term, 1996

REGINA YODER and LESTER YODER,

Petitioners,

vs.

HONEYWELL, INC., BULL HN INFORMATION SYSTEMS, INC., formerly known as Honeywell Information Systems, Inc.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Where a case is transferred from one United States District Court to one in another state pursuant to 28 U.S.C. § 1404(a) and, following the transfer, a new defendant is joined to the suit and claims are separately filed against the new defendant for the first time, does the doctrine established in *Erie v. Tompkins* require that the law of the transferee jurisdiction govern the defendant which was sued only in the transferee jurisdiction?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There are no parent or subsidiary companies of the petitioners to be listed. In this petition for certiorari, the Yoders seek review only of the Tenth Circuit ruling with respect to Bull HN Information Systems, Inc. They do not seek review of the rulings of the Tenth Circuit with respect to Honeywell, Inc. Thus, although Honeywell, Inc. appears in the caption and has been served with a copy of this petition, only the Yoders and Bull HN Information Systems, Inc. are before this Court on the Yoders' petition for certiorari.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinion Below	1
Statement of Jurisdiction	1
Statute Involved	1
Statement of the Case	1
Reasons for Granting the Writ	4
I. Where, Following Transfer Of A Diversity Jurisdiction Case From One Federal District Court To A Federal District Court In Another State, A New Party Is Joined As A Defendant To The Suit In The Transferee Jurisdiction And Claims Are Filed Separately And For The First Time Against The Newly Joined Party, The Principles Of *Erie v. Tompkins* And Its Progeny Require That The Law Of The Transferee State Apply To The Newly Joined Defendant.	4
Conclusion	8

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aragon v. Clover Club Foods Co., 857 P.2d 250 (Utah App. 1993) 8

Benne v. International Business Machines Corp., 87 F.3d 419 (10th Cir. 1996) 4, 5, 6

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) ..... i, 4, 6

Ferens v. John Deere Co., 494 U.S. 516, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990) 5, 6

Guaranty Trust Co. v. York, 326 U.S. 99, 88 L. Ed. 2079, 65 S. Ct. 1464 (1945) 7

Hickman v. Grover, 358 S.E. 2d 810 (W. Va. 1987) .. 8

Lawhon v. L.B.J. Inst. Supply, 765 P.2d 1003 (Ariz. App. 1988) 8

Orear v. International Paint Co., 796 P.2d 759 (Wash. App. 1990) 8

Trinity Broadcasting v. Westminster, 848 P.2d 916 (Colo. 1993) 7

Van Dusen v. Barrack, 376 U.S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964) 5, 6

Contents

Page

Statutes Cited:

28 U.S.C. § 1404 ..... 4, 5

28 U.S.C. § 1404(a) ..... i, 1, 6

Rule Cited:

Federal Rule of Civil Procedure 60(a) 3

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Tenth Circuit Dated January 8, 1997 ..... 1a

Appendix B — Amended Memorandum Opinion and Order of the United States District Court for the District of Colorado Filed October 10, 1995 (With Explanatory Cover Sheet) 21a

Appendix C — Order Denying Petition for Rehearing of the United States Court of Appeals for the Tenth Circuit Filed February 19, 1997 ..... 40a

Petitioners, Regina Yoder and Lester Yoder, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the Court of Appeals has not been reported but was selected for publication and is reproduced in the Appendix filed herewith ("App.") as App. A. The decision of the district court in this case is reported at 900 F. Supp. 240 and is reproduced in the Appendix filed herewith as App. B.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 8, 1997. A timely petition for rehearing was filed on January 22, 1997. The Court of Appeals denied the petition for rehearing on February 19, 1997 (App. C).

STATUTE INVOLVED

Subsection (a) of Section 1404 of Title 28, United States Code, is set forth below:

> § 1404. Change of Venue
>
> (a) For the convenience of parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

This is a personal injury case brought by Regina Yoder, a

former reservation sales representative for United Airlines, against the manufacturers of computer keyboards used by Ms. Yoder in her employment and which resulted in her suffering repetitive stress injuries. Ms. Yoder asserted claims of negligence and strict products liability against the respondents. Her husband and co-petitioner, Lester Yoder, asserted a claim for loss of consortium.

The action was originally filed in December, 1992 in the United States District Court for the Eastern District of New York on behalf of a number of plaintiffs, including the Yoders, against Honeywell, Inc. and a number of other manufacturers. Honeywell, Inc. filed an answer to the original complaint on January 23, 1993. On April 20, 1994, the Yoders' case against Honeywell, Inc. was severed from the cases of the other plaintiffs and was transferred to the United States District Court for the District of Colorado (App. A at p. 2a). At the time of transfer, the only defendant against whom the Yoders asserted a claim was Honeywell, Inc.

On March 5, 1995, following limited discovery, including a December 7, 1994 joint inspection by Honeywell, Inc. and the Yoders of keyboards at the United Airlines Reservation Center in Denver, where Regina Yoder had been employed, the Yoders moved to join, as a new party defendant, Bull HN Information Systems Inc., f/k/a Honeywell Bull Inc. and f/k/a Honeywell Information Systems, Inc. (hereinafter "Bull HN"). The motion was based on allegations by Honeywell, Inc. in February, 1995, following the inspection at the United Airlines Reservation Center, that the keyboard products alleged to have caused Ms. Yoder's injuries had in fact been manufactured by the predecessors of Bull HN, which, at that time, were subsidiaries of Honeywell, Inc. The names of these predecessors were Incoterm Corporation and Honeywell Information Systems, Inc. (App. A at p. 3a). The Yoders' motion was granted and Bull HN was joined as a defendant.

Honeywell, Inc. thereafter filed an answer to the Yoders' first amended complaint. On April 18, 1995, Bull HN filed a motion to dismiss in lieu of an answer. Following briefing on the motion, including the Yoders' brief in opposition, the motion was set to be heard on September 28, 1995. In the interim, on July 25, 1995, following additional discovery between the Yoders and Honeywell, Inc., Honeywell, Inc. filed its motion for summary judgment and a supporting brief. The Yoders opposed the motion. The trial court set hearings on both Bull HN's motion to dismiss and Honeywell, Inc.'s motion for summary judgment for September 28, 1995. Following argument, which took place prior to the completion of discovery, the trial court entered an order granting both motions. Pursuant to a motion under Fed. R. Civ. P. 60(a) filed by Honeywell, Inc., the trial court issued an amended memorandum opinion and order on October 10, 1995 disposing of all claims in the case. In granting Bull HN's motion to dismiss, the court held that, under Colorado law, the statute of limitations governing the Yoders' claims began to run when Regina Yoder knew that she had suffered an injury and that the injury was caused by the use of a computer keyboard, rejecting the Yoders' arguments that (a) the Colorado statute of limitations did not begin to run until she knew the identity of the keyboard's manufacturer; and (b) the court could not rule in Bull HN's favor based on the four corners of the complaint to which it was limited in considering a motion to dismiss.

On appeal, the Tenth Circuit affirmed the ruling of the district court. However, it affirmed the district court's ruling granting Bull HN's motion to dismiss on different grounds from those relied on by the district court. The court held, contrary to the arguments of the parties and the ruling of the trial court below, that Colorado law did not apply on the statute of limitations question (App. A at pp. 16a-20a).[1] Instead, it ruled

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1. Applying what it construed to be Colorado law, the district court (Cont'd)

that, because this was an action filed in the United States District Court for the Eastern District of New York and subsequently transferred to Colorado, the statute of limitations question was governed by New York law based on its prior holding in *Benne v. International Business Machines Corp.*, 87 F.3d 419, 423 (10th Cir. 1996).

REASONS FOR GRANTING THE WRIT

I.

WHERE, FOLLOWING TRANSFER OF A DIVERSITY JURISDICTION CASE FROM ONE FEDERAL DISTRICT COURT TO A FEDERAL DISTRICT COURT IN ANOTHER STATE, A NEW PARTY IS JOINED AS A DEFENDANT TO THE SUIT IN THE TRANSFEREE JURISDICTION AND CLAIMS ARE FILED SEPARATELY AND FOR THE FIRST TIME AGAINST THE NEWLY JOINED PARTY, THE PRINCIPLES OF *ERIE V. TOMPKINS* AND ITS PROGENY REQUIRE THAT THE LAW OF THE TRANSFEREE STATE APPLY TO THE NEWLY JOINED DEFENDANT.

This Court should grant the writ because the ruling of the appellate court applied a choice of law rule following a § 1404 transfer that goes beyond the prior rulings of this Court and undermines principles of federalism that have been in place for some 50 years since this Court's ruling in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

(Cont'd)
concluded that the statute of limitations against Bull HN began to run when Regina Yoder knew of her injury and that it had been caused by a keyboard product. The Yoders appealed that decision, arguing to the Tenth Circuit that, under Colorado law, the statute of limitations did not begin to run until Regina Yoder also knew the identity of the manufacturer of the keyboard. The Tenth Circuit never addressed that issue, but instead concluded that New York's statute of limitations, not that of Colorado, governed.

When the initial action against Honeywell, Inc. was filed in New York and later transferred to the District of Colorado, Bull HN was not a party to the New York lawsuit, as the Tenth Circuit itself recognized on page 2 of its Slip Opinion (App. A at p. 2a). Bull HN did not become a party defendant until *after* the suit against Honeywell, Inc. was transferred to Colorado and the Yoders discovered, for the first time, that defendant Bull HN may have been responsible for Regina Yoder's injuries. Thus, Bull HN was sued only in Colorado, not New York; there was never any transfer of the case against Bull HN from another state to Colorado. The case against Bull HN has been pending only in Colorado.

In its decision in *Benne*, the Tenth Circuit applied the rule that, when a district court grants a venue change pursuant to 28 U.S.C. § 1404, the transferee court is obligated to apply the law of the state in which the transferor court sits. This rule was first established by the United States Supreme Court in *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S. Ct. 805, 820-21, 11 L. Ed. 2d 945, 962 (1964). Both *Van Dusen* and *Benne* involved transfers under 28 U.S.C. § 1404, but neither involved the situation here in which, *following* the transfer, a new party was sued and brought into the action. Nothing in the language of 28 U.S.C. § 1404 provides that the transferee court must apply the law of the transferor state. Instead, the rule is a judge-made rule based on policy considerations. As originally stated in *Van Dusen*, the rule applied to transfers initiated by defendants, and was imposed to avoid the result that a defendant in a diversity action could effect a change in the substantive law applicable to the case by simply filing a motion to transfer the case to a forum "more convenient" and having law considered more favorable to the defendant. *Van Dusen*, 376 U.S. at 635-640, 11 L. Ed. 2d at 960-963. Later, in *Ferens v. John Deere Co.*, 494 U.S. 516, 525, 110 S. Ct. 1274, 108 L. Ed. 2d 443, 453 (1990), the Court held that the same rule applied even when the motion for change of

venue was initiated by the plaintiff. The Court applied the same rule in order to ensure that motions to change venue under the statute were motivated and decided based on issues of the convenience of the parties, rather than as a means to alter the law applicable to the case.

In this case, the goal of prohibiting venue transfers from being motivated by choice of law considerations is not implicated. Under the Tenth Circuit's decision in *Benne* and the prior decisions of this Court in *Van Dusen* and *Ferens*, the law of New York would apply only to claims brought against any party sued initially in New York, namely, Honeywell, Inc. At the time they sued Honeywell, Inc. in New York, the Yoders had no knowledge of a claim against Bull HN. That knowledge came only after the case against Honeywell, Inc. had been transferred to Colorado. Bull HN was sued and served in Colorado and, pursuant to the doctrine established by *Erie v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), the Tenth Circuit should have applied the law of the forum state as did the district court (App. B at p. 33a).

By applying New York's statute of limitations law to the Yoders' claims against Bull HN, the Tenth Circuit did precisely what the United States Supreme Court sought to prevent in venue changes pursuant to 28 U.S.C. § 1404(a); that is, it has prejudiced the claims of the Yoders who selected, as their forum against Bull HN, the District of Colorado. It has deprived the Yoders of the state law advantages of suing Bull HN in Colorado. *See Ferens*, 494 U.S. at 523, 108 L. Ed. 2d at 452. Further, it has undermined the principles of *Erie v. Tompkins* and its progeny to which this Court has long adhered as "a vital expression of the federal system and the concomitant integrity of the separate states." *Ferens v. John Deere*, 494 U.S. at 524, 110 S. Ct. at 1280, 108 L. Ed. at 453.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 88 L. Ed. 2079, 65 S. Ct. 1464, 1470 (1945), this Court explained the intent of the *Erie* decision as being:

> . . . to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court.

In its decision below in this case, the Tenth Circuit has severely undermined these important constitutional principles by applying New York law to tort claims for injuries that were suffered by Colorado residents in Colorado and asserted against a defendant only in a federal district court sitting in Colorado. The decision is inconsistent with prior rulings of this Court and should not be permitted to stand.

The error of the Tenth Circuit in applying New York law was not mere harmless error in this case. That ruling resulted in the Tenth Circuit's never addressing the Yoder's contention and supporting authority demonstrating that the trial court's holding that the statute of limitations began to run even before Regina Yoder knew or should have known the identity of the manufacturer of the product that caused her injuries not only misapplied Colorado law, but was contrary to the rule of the majority of jurisdictions having limitations statutes similar to Colorado's that had addressed the issue.[2]

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2. *See Trinity Broadcasting v. Westminster*, 848 P.2d 916, 923 (Colo. 1993). Although the Colorado appellate courts had not ruled on the precise question raised by the Yoders, in *Trinity*, that Colorado Supreme Court had

(Cont'd)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Cont'd)
suggested, *in dictum*, that the limitations period did not begin to run until the identity of the tortfeasor was known. The Yoders asked the Tenth Circuit to certify the question to the Colorado Supreme Court if it had any doubt that that indeed was the Colorado rule. The courts in other states having similar statutes that had addressed the question had followed the rule urged by the Yoders. *Orear v. International Paint Co.*, 796 P.2d 759, 763 (Wash. App. 1990); *Aragon v. Clover Club Foods Co.*, 857 P.2d 250, 253 (Utah App. 1993); *Hickman v. Grover*, 358 S.E. 2d 810, 813 (W. Va. 1987); *Lawhon v. L.B.J. Inst. Supply*, 765 P.2d 1003, 1007 (Ariz. App. 1988).

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED JANUARY 8, 1997

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 95-1464

REGINA M. YODER, LESTER L. YODER,

Plaintiffs-Appellants,

v.

HONEYWELL INC., BULL HN INFORMATION SYSTEMS, INC., FORMERLY KNOWN AS HONEYWELL INFORMATION SYSTEMS, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 94-B-1256)

Richard M. Foster of Cockrell, Quinn & Creighton, Denver, Colorado (Marc W. Weingarten of Greitzer & Locks, Philadelphia, Pennsylvania, with him on the briefs), for Plaintiffs-Appellants.

Russell S. Ponessa (Robert B. MacDonald, also of Popham, Haik, Schnobrich & Kaufman, Minneapolis, Minnesota; Robert J. Potrykus and Giovanni M. Ruscitti, Denver, Colorado; and Bert L. Wolff of Skadden, Arps, Slate, Meagher & Flom, New

Appendix A

York, New York, with him on the brief) for Defendant-Appellee Honeywell Inc.

Daniel F. Warden of Bond & Morris, Denver, Colorado, for Defendant-Appellee Bull HN Information Systems, Inc.

Before **HENRY, LOGAN** and **BRISCOE,** Circuit Judges.

LOGAN, Circuit Judge.

Plaintiffs Regina M. and Lester L. Yoder appeal the district court's dismissal of their products liability action against defendants Honeywell Inc. (Honeywell) and Bull HN Information Systems, Inc. (Bull). Regina Yoder allegedly suffered repetitive stress injuries as a result of using defective computer keyboards while employed at United Airlines in Denver, Colorado. Plaintiffs assert that summary judgment was improper because material issues of fact remain as to whether (1) Bull was the alter ego or instrumentality of its parent Honeywell, and (2) Honeywell was a manufacturer or apparent manufacturer under Colorado law and *Restatement (Second) of Torts* § 400. Plaintiffs also argue that the trial court erred in dismissing plaintiffs' action against defendant Bull as barred by the statute of limitations.

I

Numerous plaintiffs, including the Yoders, originally filed suit in December 1992 in the Eastern District of New York against Honeywell and other computer keyboard manufacturers. In April 1994 that court severed the Yoder plaintiffs' case, as permitted by Fed. R. Civ. P. 21, and transferred it to the United States District Court for the District of Colorado. *See* 28 U.S.C. § 1404. Honeywell was the only defendant at that time.

Appendix A

Honeywell's first answer filed in January 1993 denied in general terms plaintiffs' allegations that Honeywell manufactured the keyboards at issue. In August 1994, shortly after the transfer of venue, in a scheduling/planning conference Honeywell more specifically made the identity of the manufacturer an issue. On December 7, 1994, Honeywell and plaintiffs jointly inspected the keyboards used at the reservation center where Regina Yoder had worked. Honeywell then formally notified plaintiffs on February 2, 1995, that Honeywell Information Systems Inc., a subsidiary of Honeywell now known as Bull HN Information Systems, Inc., manufactured the keyboards. Plaintiffs moved on March 5, 1995, to join as a party defendant Bull HN Information Systems, Inc., f/k/a/ Honeywell Bull, Inc. and f/k/a Honeywell Information Systems, Inc. The predecessors of Bull HN Information Systems, Inc. also include Incoterm Corporation; we refer to these entities collectively as Bull. In plaintiffs' amended complaint they alleged that Honeywell and/or Bull manufactured the keyboard equipment and asserted that Bull and its predecessors were alter egos or instrumentalities of Honeywell.

The district court granted Honeywell's motion for summary judgment. The court first found that Honeywell was not liable to plaintiffs as a manufacturer of the keyboards. *Yoder v. Honeywell Inc.*, 900 F. Supp. 240, 242 (D. Colo. 1995). The district court noted that

> None of the . . . keyboards examined bore trademarks identifying the manufacturer on the front of the keyboard enclosures. Each of the seven keyboards had labels bearing a trademark on the bottom of the keyboard enclosures. Three of the keybards bore the

> trademark name Incoterm and four bore the Honeywell trademark. Based on [a former Honeywell employee's] examination of the keyboards he determined that the keyboards were not manufactured by Honeywell. Plaintiffs have made no showing that a genuine issue of fact exists that Honeywell manufactured, sold, or distributed any computer keyboard alleged to be defective.

Id. at 242 (citations omitted). The district court then declined to interpret Colorado products liability law to impose liability on a corporation that provides a trademark for a product under an "apparent manufacturer" theory. *Id.* at 246. The court also found that plaintiffs failed to establish that genuine issues of material fact remained whether to pierce Bull's corporate veil to hold the parent, Honeywell, liable. Finally, the district court granted Bull's motion to dismiss, finding that plaintiffs' claim was time-barred.

II

Plaintiffs first assert that summary judgment[1] in favor of Honeywell was improper. We review an order granting summary judgment de novo. *Farthing v. City of Shawnee, Kan.*, 39 F.3d 1131, 1134 (10th Cir. 1994).

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1. Plaintiffs assert further error because a court order delayed discovery against Bull, and Honeywell failed to fully respond to plaintiffs' discovery. However, plaintiffs failed to file an affidavit, as provided by Fed. R. Civ. P. 56(f), explaining why they could not present facts to oppose the summary judgment motion. *See Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1376-77 (10th Cir. 1988). We thus assume plaintiffs had an ample opportunity to conduct discovery. *Id.* at 1377.

Appendix A

Because this is a diversity action, we first determin which state law to apply. The choice of law is determined by the conflict of laws rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). The district court stated that Colorado law would apply as the law of the forum state, apparently overlooking that this case originated in the Eastern District of New York. "The rule is settled that when a district court grants a venue change pursuant to 28 U.S.C. § 1404, the transferee court is obligated to apply the law of the state in which the transferor court sits." *Benne v. International Business Machines Corp.*, 87 F.3d 419, 423 (10th Cir. 1996) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (rule applies whether defendant or plaintiff initiates change of venue)). In this case, therefore, New York choice of law rules apply.

New York employs an "interest analysis" test, which requires application of the substantive law of the state which has the greatest interest in the litigation. *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 684 (N.Y. 1985). But before applying this test, New York courts determine whether an actual conflict in the substantive law exists. Defendant Honeywell asserts that the specific substantive tort law of all states with a significant interest in this litigation — Colorado, Delaware and Minnesota[2] — require that plaintiffs prove a defendant was the manufacturer (or is liable as an apparent manufacturer) of the product. Thus, defendants assert there is no conflict, and we should apply Colorado law on the tort liability claims. If a

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2. Delaware is the state of defendants' incorporation and Minnesota is the principal place of business of both defendants. Of course New York as the original forum state has some interest. But because none of these defendants or plaintiffs are domiciled there, the keyboards were not manufactured there, and the plaintiff did not use the keyboards there, the other three states' interests exceed that of New York.

potential conflict does exist, Colorado, as plaintiffs' domiciliary and the place where Regina Yoder received the injury, would seem to have the greatest interest in the outcome, *see Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972). *But see Hadar v. Concordia Yacht Builders, Inc.*, 886 F. Supp. 1082, 1093-94 (S.D.N.Y. 1995) (state where product manufactured has large stake in governing liability of manufacturers in its territory). Therefore, we look to Colorado for the applicable substantive tort law.

Under New York choice of law principles, however, "the law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders." *Fletcher v. Atex Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (citations and quotations omitted). If we were to apply this rule the law of Delaware, the state of defendant Bull's incorporation, would apply to the corporate veil issue. Because the substantive tort law of Colorado applies here, however, we question whether New York would apply Delaware law to this related issue. In any event, our review of Delaware law indicates it is similar to Colorado, although Delaware may require somewhat more to pierce a corporate veil. *Compare Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 793 (Del. Ch. 1992) (to pierce corporate veil of subsidiary plaintiff must show fraud or "that the parent and the subsidiary operated as a single economic entity" and "that an overall element of injustice or unfairness" is present) (quotations and citations omitted) *with Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1262 (10th Cir. 1989) (listing ten factors Colorado courts consider in determining whether subsidiary is instrumentality of parent; also considering element of injustice). Thus, we analyze the corporate veil issue under Colorado law.

Appendix A

A

Plaintiffs sought to pierce the corporate veil of Bull and hold its parent Honywell liable in tort because, they alleged, Bull was the alter ego or mere instrumentality of Honeywell. "[C]orporate veils exist for a reason and should be pierced only reluctantly and cautiously. The law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities." *Boughton v. Cotter Corp.*, 65 F.3d 823, 836 (10th Cir. 1995) (quotations omitted) (applying Colorado law).

> When, however, the corporate structure is used so improperly that the continued recognition of the corporation as a separate legal entity would be unfair, the corporate entity may be disregarded and corporate principals held liable for the corporations's actions. Thus, if it is shown that shareholders used the corporate entity as a mere instrumentality for the transaction of their own affairs without regard to separate and independent corporate existence, or for the purpose of defeating or evading important legislative policy, or in order to perpetrate a fraud or wrong on another, equity will permit the corporate form to be disregarded and will hold the shareholders personally responsible for the corporation's improper actions.

Micciche v. Billings, 727 P.2d 367, 372-73 (Colo. 1986) (citations omitted).

In *Lowell Staats*, we noted that under Colorado law whether

a subsidiary is an instrumentality of the parent is based on evaluating these elements:

> (1) The parent corporation owns all or majority of the capital stock of the subsidiary. (2) The parent and subsidiary corporations have common directors or officers. (3) The parent corporation finances the subsidiary. (4) The parent corporation subscribes to all the capital stck of the subsidiary or otherwise causes its incorporation. (5) The subsidiary has grossly inadequate capital. (6) The parent corporation pays the salaries or expenses or losses of the subsidiary. (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. (8) In the papers of the parent corporation, and in the statements of its officers, "the subsidiary" is referred to as such or as a department or division. (9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. (10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.

Id. at 1262-63 (quoting *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940)). Although the determination is primarily a question of fact, "a verdict as a matter of law may be justified where the facts, viewed most favorably to the party seeking to pierce the veil, do not justify such a result." *Boughton*, 65 F.3d at 836 n.22.

Appendix A

Plaintiffs argue that the district court improperly read our opinion in *Lowell Staats* as requiring plaintiffs to prove "that the corporate entity was used to defeat public convenience, or to justify or protect wrong, fraud or crime." Appellants' Brief at 8. Plaintiffs appear to contend that their alter ego argument is distinguishable from the more generic corporate veil case such as *Lowell Staats*. Plaintiffs cite *Ward v. Cooper*, 685 P.2d 1382 (Colo. App. 1984), for the proposition that even when a corporation has observed corporate formalities, and has not engaged in fraud, the Colorado courts will impose the alter ego doctrine. *See also Friedman & Son, Inc. v. Safeway Stores, Inc.*, 712 P.2d 1128 (Colo. App. 1985); *New Sheridan Hotel & Bar, Ltd. v. Commercial Leasing Corp.*, 645 P.2d 868 (Colo. App. 1982).

The brief opinion in *Ward* follows the analysis in *Lowell Staats* and *Fish*: In *Ward* the defendant and his wife owned most of the stock of the two corporations; they were officers and/or directors; the defendant dominated the corporations and used funds from one to benefit the other; and to escape personal liability defendant caused one of the corporations to repurchase his stock. *See* 685 P.2d at 1383-84. We acknowledge that courts have not always been clear in using the terms "alter ego," "mere instrumentality," and "piercing the corporate veil," *see Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 839 (D. Del. 1978) (citing *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.) (relationships between parent and subsidiary corporations enveloped in "mists of metaphor")). Under Colorado law, however, in order to hold a parent corporation liable for the torts of its subsidiary, a plaintiff must show that the corporate structure was used in such a way that "recognition of the separate corporate entity would result in injustice." *Lowell Staats*, 878 F.2d at 1262. This determination

requires applying the ten factors in *Fish* and *Lowell Staats*. We now apply these factors, viewing the record in the light most favorable to plaintiffs.

First, as the district court noted, until 1987, Honeywell owned all of the stock of Bull's predecessor, Honeywell Information Systems Inc. (HIS). This fact alone is not enough to justify disregarding the corporate form. *See Industrial Comm'n v. Lavach*, 439 P.2 359, 361 (Colo. 1968). Second, the three-member board of directors of HIS were all members of Honeywell's board of directors from 1970 until 1979; two members of Honeywell's board continued as HIS directors until 1987. Identity of directors, however, "has been held to be innocuous where, as here, there is no evidence that through the board the parent controlled the subsidiary." *Yoder*, 900 F. Supp. at 244 (citing *Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1364 (10th Cir. 1974)). Concerning the third factor, whether the parent financed the subsidiary, the record reveals that Honeywell provided some type of financial assistance to HIS. Honeywell caused the incorporation of Bull's predecessor, HIS, thus establishing the fourth factor. Thus, plaintiffs arguably established the first four factors.

The remaining factors, however, favor Honeywell. The record reveals no evidence of gross undercapitalization, *see* Appellants' App. 246, 251 (1970 combined assets of Bull's predecessor, HIS, were $1.3 billion), or that Honeywell paid salaries or expenses for Bull. Less than five percent of Bull's business was with Honeywell. Plaintiffs did not show that Honeywell referred to Bull or its predecessors as a department or division, or that Bull's directors or executives took direction from Honeywell. Finally, defendants evidently observed the formal legal requirements of maintaining separate identities of

the two corporations. Thus, there remain no fact questions with respect to the test whether Bull was an instrumentality or alter ego of Honeywell.

Additionally, we must consider that courts generally "are less likely to pierce a corporate veil when a consensual, contract-like transaction is involved than when a nonconsensual, tort-like transaction is involed," *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1577 (10th Cir.) (applying Utah law), *cert. denied*, 498 U.S. 849 (1990); "[o]f particular significance in most tort cases is whether the subsidiary is undercapitalized, because tort claimants usually have not voluntarily dealt with the subsidiary, and the question is whether a parent should be able to transfer a risk of loss or injury to members of the general public in the name of a subsidiary that may be marginally financed." *Nelson v. International Paint Co.*, 734 F.2d 1084, 1092 (5th Cir. 1984) (applying Texas law). Even if Colorado courts would be more likely to pierce a corporate veil in a tort case, the facts of this case do not support doing so because Bull was adequately capitalized.

Finally, plaintiffs assert that the license agreement under which Honeywell allowed Bull to use its name is an important fact that proves an alter ego relationship. They point out that the agreement required Bull to comply with Honeywell's quality control standards and to make its products available for inspection by Honeywell. Plaintiffs argue the injustice of Honeywell benefiting from having its name on products manufactured by its subsidiary and then using Bull's corporate veil as a shield from liability.

We do not believe the licensing agreement here constituted the type of control Colorado courts consider in determining

whether to hold a parent liable for actions of a subsidiary. The parent here did not allow an *under-funded* subsidiary to use its name, and then attempt to escape liability. Further, if Honeywell acted to keep plaintiffs from discovering the true manufacturer, that would support a finding that Honeywell was using Bull to avoid liability and should e estopped from doing so. *See Nelson*, 734 F.2d at 1091 (refusing to apply estoppel based on facts of case). Our review of the record, however, reveals no such evidence. Viewing all the factors in this case as a whole, they "do not demonstrate that the corporate form 'was used to defeat public convenience, or to justify or protect wrong, fraud or crime.' " *Boughton*, 65 F.3d at 838. The possibility that plaintiffs may not be able to obtain a judgment against a subsidiary because they are barred by the statute of limitations is not the type of injustice that warrants piercing the corporate veil. *See id.* at 836 ("The possibility that the plaintiffs may have difficulty enforcing a judgment against [the subsidiary] alone is not the type of injustice that warrants piercing the corporate veil."). We thus uphold the district court's determination on this issue.

B

Plaintiffs next assert the district court erred in ruling that under Colorado law Honeywell was not a manufacturer of the keyboards. Plaintiffs primarily argue that Honeywell was liable as an "apparent manufacturer" under *Restatement (Second) of Torts* § 400 (1965) because it allowed its name to be used on products manufactured by one of its subsidiaries. "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." *Restatement (Second) of Torts* § 400. "[O]ne puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark." *Id.* § 400 cmt. d.

We have found no Colorado cases addressing whether Colorado would apply or reject § 400. In this situation, "we must attempt to construe the law of the State of Colorado in the manner in which the Supreme Court of Colorado would, if faced with the same facts and issue." *City of Aurora v. Bechtel Corp.*, 599 F.2d 382, 386 (10th Cir. 1979). In addition to considering analogous Colorado law, we look also to other state and federal decisions and to the general trend of authority. *Id.*

The Colorado Products Liability Act, and in particular Colo. Rev. Stat. § 13-21-401, imposes strict liability for defective products on a "manufacturer" of the product. The statute defines manufacturer as

> [A] person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller who has actual knowledge of a defect in a product or a seller of a product who creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into his possession and before it is sold to the ultimate user or consumer. The term also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or

> significant part, the manufacturer. A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or controlled, in some significant manner, the manufacturing process of the product *and the seller discloses who the actual manufacturer is.*

Colo. Rev. Stat. § 13-21-401 (emphasis added). Although this statute does not expressly adopt *Restatement (Second)* § 400, the last sentence of the statutory definition of manufacturer is similar to § 400. By negative implication the statute allows a seller who places a private label on a product without disclosing the actual manufacturer to be held liable as a manufacturer.

Assuming Colorado has adopted the essence of *Restatement* § 400 there is a further obstacle for plaintiffs. Honeywell was not a seller or distributor of the keyboards at issue here. Many courts have declined to extend § 400 beyond sellers and retailers of defective products. *See, e.g., Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1463 (2d Cir. 1995) (upholding summary judgment on apparent manufacturer claim where defendant was not seller of product or otherwise involved in chain of distribution); *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1236 (9th Cir. 1989) (defective tire bore defendant's name but court refused to impose liability because defendant did not manufacture or sell tire); *Affiliated FM Ins. Co. v. Trane Co.*, 831 F.2d 153, 155-56 (7th Cir. 1987) (disallowing liability for product designer who did not sell, manufacture or install product); *Nelson v. International Paint Co., Inc.*, 734 F.2d 1084 (5th Cir. 1984) (court

would not impose liability on parent under *Restatement (Second)* § 400 even though product bore its name because parent was not involved in distribution); *Hebel v. Sherman Equip.*, 442 N.E.2d 199, 202-03 (Ill. 1982) (stating that apparent manufacturer doctrine was designed to apply to sellers and court found only two cases applying it to nonsellers).

Plaintiffs point out that some courts have extended strict liability under the § 400 apparent manufacturer doctrine to an owner of a trademark not otherwise involved in the chain of distribution. *See, e.g., Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134 (Pa. 1987) (although Caterpillar did not participate in distribution, it could be strictly liable for defective product because it allowed its name to be placed on equipment); *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155 (Ill. 1979) (licensor whose trademark was on an allegedly defective tire could be strictly liable for injury even though defendant not "a link in the chain of distribution"), *appeal dismissed, cert. denied*, 444 U.S. 1060 (1980).

Plaintiffs also assert that Honeywell is liable as a manufacturer because under Colo. Rev. Stat. § 13-21-401 a manufacturer includes someone who "otherwise prepares a product" before its sale, and that Honeywell "prepared" some of the keyboards by designing and copyrighting a circuit board and allowing its name to appear on the keyboard. *See* Appellants' Brief at 30-31. We have reviewed the record and find no support in it for plaintiffs' assertion that Honeywell designed and copyrighted the printed circuit board. Further, the plain meaning of the phrase "otherwise prepares a product" does not encompass use of one's name on that product.

After considering the overwhelming majority of the

opinions rejecting application of apparent manufacturer liability to a trademark owner not in the chain of distribution, the Illinois Supreme Court decision in *Hebel* distinguishing its earlier *Connelly* decision, and the wording of the Colorado statute, we agree with the district court that the Colorado Supreme Court likely would not impose liability on Honeywell under an apparent manufacturer theory. The district court did not err in concluding that no genuine issue of material fact remained whether Honeywell could be liable as a manufacturer or apparent manufacturer under Colorado law.

III

Finally, plaintiffs assert that the district court erred in granting Bull's motion to dismiss for failure to state a claim because the action was time-barred under Colorado law. We review de novo a district court's grant of a motion to dismiss for failure to state a claim. *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 854 (10th Cir. 1996).

> We uphold a dismissal under Fed. R. Civ. P. 12(b)(6) only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the wel-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff.

Fuller v. Norton, 86 F.3d 1016, 1020 (10th Cir. 1996).

The district court applied the Colorado statute of limitations. Although the parties did not dispute this issue at the district court or on appeal, a choice of law question exists.

Appendix A

We recently addressed the question in *Benne v. International Business Machines Corp.*, 87 F.3d 419 (10th Cir. 1996). That was a repetitive stress injury action against keyboard manufacturers filed in the United States District Court for the Eastern District of New York apparently at about the same time as was the instant case. That court transferred the case to the District of Kansas, which granted the manufacturer's motion for summary judgment. We held that the law of New York, the state in which the transferor court sat, governed the statute of limitations. We thus applied the New York borrowing statute which provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Benne, 87 F.3d at 425. *See* N.Y. Civ. Prac. Law 202 (McKinney, 1990). *Benne* controls here; plaintiffs' claims "must have been timely under both the limitations periods of New York [and the transferee state]."[3] *Benne*, 87 F.3d at 425.

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3. In *Benne*, plaintiffs argued that defendants, by arguing for application of the substantive laws of the transferee state, had waived application of the transferor state's statute of limitations. *See* 87 F.3d at 423-25. We rejected this argument in part because defendant had argued that under the choice of laws rules of the transferor state, the laws of the transferee state would control. *Id.* at 425. That was not the case here, where the parties and court all assumed Colorado law applied. But in *Benne* we also found no waiver because "the

(Cont'd)

Appendix A

In New York an action to recover damages for personal injuries must be commenced within three years from the date the cause of action accrues. "Unlike the [transferee state's] limitations statute, the New York limitations period commences on the date of *injury*." *Id.* at 427 (citing N.Y. Civ. Prac. Law 214 (McKinney 1990)) (emphasis added); *Snyder v. Town Insulation, Inc.*, 615 N.E.2d 999, 1000-01 (N.Y. 1993). Under New York law "[t]he injury itself, rather than the negligent act by defendant or the discovery of the wrong by plaintiff, marks the date of accrual." *Benne*, 87 F.3d at 427 (citing *Piper v. IBM*, 639 N.Y.S.2d 623 (1996) (other citations omitted)); *see also Thorn v. IBM, Inc.*, 1996 WL 673372 (8th Cir. Nov. 22, 1996) (federal and New York courts have held that the New York "discovery rule" for injuries caused by latent effects of exposure to

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(Cont'd)

transferee court has the obligation to apply the law of the transferor state." *Id.* We noted that in a venue transfer case

> if a defendant, either by fraud, deceit, or misrepresentation, prevented plaintiff from filing a timely claim in the transferor state, then estoppel or waiver of the statute of limitations is possible. Further, a defendant may always choose not to plead the defense of the statute of limitations, in which case, the limitations period would not become an issue. Note, however, that this would be a matter strictly involving the application of the law of the transferor state, not a matter of the defendant's actions causing the court to resort to the statute of limitations of the transferee state.

Id. We hold that defendant Bull did not waive the statute of limitations defense simply by pleading the defense based on the wrong choice of law. *Cf. Daingerfield Island Protective Soc. v. Babbitt*, 40 F.3d 442, 444-45 (D.C. Cir. 1994) (limitations defense sufficiently raised for Fed. R. Civ. P. 8, by bare assertion).

substances, N.Y. Civ. Prac. Law 214-c(2) (McKinney 1990), does not apply to repetitive stress injury). Further, New York courts have held that the limitations period begins to run in a repetitive stress injury when the plaintiff first experienced symptoms of carpal tunnel syndrome rather than when the symptoms developed into a diagnosable condition. *Piper,* 639 N.Y.S.2d at 623; *see also Thorn* at *3-4.

The face of plaintiffs' first amended complaint states that she began to suffer symptoms of numbness, tingling and other impairments about May 1990, and by December 1990 she had been diagnosed with several conditions including bilateral radial tunnel syndrome and had undergone corrective surgery. Therefore, under New York law, plaintiffs' cause of action accrued in May 1990 (and certainly no later than her December 1990 surgery for the repetitive stress injury). Plaintiffs' addition of Bull as a defendant in March 1995, more than three years after the cause of action accrued, was untimely.

Because the district court and the parties did not address the New York statute of limitations, we have reviewed New York law to determine whether plaintiffs might have a basis to argue the date of accrual should be later than indicated by normal accrual rules, or that defendant Bull might be estopped from pleading the statute of limitations. We see no justification for applying alternative accrual rules. *See Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088, 1095-98 (N.D.N.Y. 1977) (discussing theories of continuous torts, foreign object discovery rule, and continuous treatment doctrine). Further, there is no basis on which the defendants could be held estopped from raising the statute of limitations. *See id.* at 1104-05. We hold that the district court correctly dismissed the suit against Bull as untimely.

Appendix A

We are mindful that plaintiffs now have no remedy. But if plaintiffs had examined the keyboards before bringing suit they would have noted that although the name "-Honeywell" appeared on some, "Incoterm" or "Honeywell Systems Inc." also appeared on all but two of the keyboards, and those two referred to the same Puerto Rican place of manufacture as was on the keyboards containing Honeywell Systems Inc.'s name. Prudence would dictate that plaintiffs promptly investigate each of these entities as possible defendants.

AFFIRMED.

APPENDIX B — AMENDED MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED OCTOBER 10, 1995 (WITH EXPLANATORY COVER SHEET)

[The following Amended Memorandum Opinion and Order by the District Court for the District of Colorado dated October 10, 1995 amended a prior order dated October 2, 1995. The amended order corrected claimed errors in that portion of the October 2, 1995 order concerning Honeywell, Inc. and did not affect any portions of the order that are the subject of this Petition for Certiorari. The text of the attached Amended Memorandum Opinion and Order relating to the issue addressed in this Petition for Certiorari (App. B, pp. 33a-37a) is identical to the language contained in the October 2, 1995 Memorandum Opinion and Order.]

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 94-B-1256

REGINA M. YODER AND LESTER L. YODER,

Plaintiffs,

v.

HONEYWELL INC. AND BULL INFORMATION SYSTEMS INC., FORMERLY KNOWN AS HONEYWELL INFORMATION SYSTEMS INC.,

Defendant.

AMENDED MEMORANDUM OPINION AND ORDER

Babcock, J.

Plaintiffs Regina M. Yoder and Lester L. Yoder (the Yoders) bring this product liability action against defendants Honeywell Inc. (Honeywell) and Bull Information Systems Inc. (Bull) for injuries caused to Ms. Yoder from her use of an allegedly defective computer keyboard. Presently before me are Honeywell's motion for summary judgment and Bull's motion to dismiss. Honeywell asserts entitlement to judgment because it did not manufacture the keyboards at issue and it is not the "alter ego" of Bull, the manufacturer. Bull contends the Yoders' claim against it is barred by the applicable statute of limitations. The motions are fully briefed and orally argued. For the reason set forth in this order, I grant both motions.

Appendix B

I.

The following facts are not genuinely disputed. This action was originally filed on December 29, 1992 in the Eastern District of New York as part of a multiple party litigation. On April 21, 1994 Honeywell moved for and was granted a transfer of venue to this district.

From May 1990 until November 1990 Ms. Yoder was diagnosed with or underwent surgery for the following conditions: bilateral radial tunnel syndrome, bilateral thoracic outlet syndrome, bilateral tendinitis of the upper extremities; corrective surgery for left carpal tunnel syndrome; and corrective surgery for right carpal tunnel syndrome. Complaint, ¶¶ 69-70. Ms. Yoder claims that she incurred these injuries while employed by United Airlines at Stapleton Airport in Denver as a result of her use of an allegedly defective, unsafe and unreasonably dangerous computer keyboard designed, manufactured, marketed and sold by Honeywell and/or Bull, including Honeywell Information Systems, Inc. (HIS).

At a Scheduling/Planning conference on August 17, 1994, Honeywell contested liability based on product identification. Both parties were present at an inspection of the subject keyboards on December 7, 1994. Charles L. Fauble conducted the inspection on behalf of Honeywell.

In support of its motion, Honeywell presents the affidavit of Charles L. Fauble (Fauble). Fauble has been employed in the keyboard manufacturing business since 1978. Fauble Aff., ¶ 1. He was employed by Honeywell from 1986 to 1993 as the director of engineering for its keyboard division. Fauble Aff., ¶ 2. On December 7, 1994 Fauble examined several of the

keyboards at the United Airlines Reservation Center at Stapleton Airport where Ms. Yoder worked and disassembled three. Fauble Aff., ¶ 8. On July 19, 1995 Fauble examined another seven keyboards. Fauble Aff., ¶ 9.

None of the seven keyboards examined bore trademarks identifying the manufacturer on the front of the keyboard enclosures. Fauble Aff., ¶ 13. Each of the seven keyboards had labels bearing a trademark on the bottom of the keyboard enclosures. Fauble Aff., ¶ 14. Three of the keyboards bore the trademark name Incoterm and four bore the Honeywell trademark. Id. Based on Fauble's examination of the keyboards he determined that the keyboards were not manufactured by Honeywell. Fauble Aff., ¶ 10. Plaintiffs have made no showing that a genuine issue of fact exists that Honeywell manufactured, sold, or distributed any computer keyboard alleged to be defective.

Honeywell also submits the affidavit of its current secretary Sigurd Ueland, Jr. in support of its contention that it is not the alter ego of HIS. Ueland has served in an executive capacity for Honeywell since 1973. Ueland Aff., ¶ 3. He has served as corporate secretary for a number of Honeywell subsidiaries including HIS. Id.

HIS was informed in 1970 for the purpose of designing, developing, manufacturing and marketing a complete line of computers and computer-related services. Ueland Aff., ¶ 11. HIS was owned by General Electric and Honeywell from 1970 to 1977. In 1977, HIS became a wholly-owned subsidiary of Honeywell and remained so until 1987. Ueland Aff., ¶ 13. In 1987, Honeywell sold 57.5% of its interest in HIS to Compagnie des Machines Bull (Machines Bull), and NEC Corporation, who

renamed HIS, Honeywell Bull Inc. (Honeywell Bull). Ueland Aff., ¶ 14. In 1988, Honeywell sold an additional 22.6% of its interest in Honeywell Bull to Machines Bull. Honeywell Bull was then renamed Bull HN Information Systems. Ueland Aff., ¶ 15. Honeywell sold it remaining interest in Bull to Groupe Bull, formerly Machines Bull, in 1991.

In 1969 Incoterm Corporation (Incoterm) was formed to design, develop, manufacture, market and service electronic data computer-related products and software. Ueland Aff., ¶ 17. Incoterm was merged with BWL Terminal Sales, Inc. a wholly owned subsidiary of Honeywell in 1977, which retained the name Incoterm. In 1979 Incoterm was merged into HIS. Ueland Aff., ¶ 21.

At all times HIS observed corporate formalities including annual shareholder meetings and regular board of director meetings evidenced by corporate minutes. Ueland Aff., ¶ 26. HIS maintained its own bank accounts and corporate offices. Ueland Aff. ¶ 28-29. In 1970 at its formation, HIS had assets in excess of $1.3 billion dollars and sales of $859 million. Ueland Aff., ¶ 30. Honeywell's sales to HIS from 1973 to 1985 were never more than 0.5% of Honeywell's total sales. For the same period, HIS's sales to Honeywell never exceeded 3.3% of sales. Ueland Aff., ¶ 35.

Until 1979 the board of directors of HIS and the board of directors of Honeywell consisted of the same individuals. Plaintiff's Response Brief, Exh. E, Ueland Deposition (Ueland Depo.), p. 28-29. From 1979 to 1987, HIS's board of directors included the chief financial officer of Honeywell, the chief accounting officer of Honeywell, and the head operating person of the computer business at HIS. Ueland Depo., p. 29. None of

the employees of Honeywell were employed by HIS. Ueland Aff., ¶ 36.

On March 26, 1987, Honeywell and HIS entered into a trademark license agreement. Pursuant to the terms of the agreement, HIS was granted the right to use the Honeywell trade name, service mark and trademark as part of its corporate name. Plaintiff's Response Brief, Exh. D., p. 1. In return, HIS agreed that all products produced by HIS which bore the Honeywell trademark would comply with quality control standards prescribed by Honeywell. Id., p. 6.

The Yoders argue that HIS was merely an instrumentality of Honeywell and, therefore, as HIS's alter ego, Honeywell is liable for Ms. Yoder's injuries. In the alternative, the Yoders assert that Honeywell is liable for Ms. Yoder's injuries even if it did not manufacture the subject keyboard because it was the apparent manufacturer. I disagree.

On February 3, 1995, Honeywell informed counsel for the Yoders that it believed that the products at issue were not manufactured by Honeywell but, instead, by Honeywell Information Systems, Inc. (HIS), now known as Bull Information Systems (Bull). On March 3, 1995, the Yoders moved to amend their complaint to add Bull as a party defendant. The motion was granted and the amended complaint was filed on March 15, 1995.

Bull then filed a motion to dismiss on April 17, 1995, contending that the complaint must be dismissed for failure to bring the action within the two year limitations period established by C.R.S. 13-80-106. I agree.

Appendix B

II.

Summary judgment shall enter where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If a movant establishes entitlement to judgment as a matter of law given uncontroverted, operative facts contained in the documentary evidence, summary judgment will lie. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). The operative inquiry is whether, based on all the documents submitted, a reasonable trier of fact could find by a preponderance of evidence that the plaintiff is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Mares*, 971 F.2d at 494. Summary judgment should not enter if, viewing the evidence in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party. *Anderson*, 477 U.S. at 252; *Mares*, 971 F.2d at 494.

III.

"Because this is a suit based on diversity jurisdiction, we apply the law of the forum state, in this case Colorado." *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1262 (10th Cir. 1989). Whether a parent corporation should be held liable for the acts of its subsidiary based on the "alter ego" doctrine is based on the analysis of the following factors:

> (1) the parent corporation owns all or majority of the capital stock of the subsidiary; (2) the parent and subsidiary corporations have common directors or officers; (3) the parent corporation finances

> the subsidiary; (4) the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation; (5) the subsidiary has grossly inadequate capital; (6) the parent corporation pays the salaries or expenses or losses of the subsidiary; (7) the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (8) in the papers of the parent corporation, and in the statements of its officers, "the subsidiary" is referred to as such or as a department or division; (9) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation; (10) the formal legal requirements of the subsidiary as a separate and independent corporation are not observed. *Id.* at 1262-1263.

It is undisputed that Honeywell owned 100% of HIS stock from 1970 until 1987. This unity of interest, however, standing alone is insufficient to find that the personalities of the corporation and its subsidiary are not distinct. *Industrial Comm'n v. Lavach*, 439 P.2d 359, 361 (Colo. 1968); See *Fink v. Montgomery Elevator Co.*, 421 P.2d 735, 739 (1966). The board of directors of HIS consisted wholly of members of the board of directors of Honeywell from 1970 until 1979. After 1979, two of the three members of HIS's board of directors were members of Honeywell's board of directors until 1987. The identity of directors has been held to be innocuous where, as

here, there is no evidence that through the board the parent controlled the subsidiary. *Quarles v. Fuqua Industries Inc.*, 504 F.2d 1358, 1364 (10th Cir. 1974). Although Honeywell was responsible for the incorporation of HIS, there is no evidence that HIS failed to maintain a separate corporate existence or that HIS was undercapitalized at its inception. Furthermore, the evidence presented shows that the sales between Honeywell and HIS never exceeded 10% of the total sales of either company.

"In order to hold [Honeywell] liable for [Bull/HIS alleged tortious conduct], [the Yoders] must prove the corporate entity was used to defeat public convenience, or to justify or protect wrong, fraud or crime." *Lowell Staats*, 878 F.2d at 1264-65. The Yoders have failed to present any evidence that Honeywell used HIS as a shield to protect Honeywell from its own egregious acts or other conduct intended to benefit Honeywell at a cost to the public. To the contrary, from its inception, HIS had a legitimate business purpose, was adequately funded, and operated as a self-sufficient corporate entity. The Yoders have failed to meet their burden to present genuine issues of material fact that Honeywell was the "alter ego" of HIS and, therefore, liable for the acts of HIS's successor Bull.

In the alternative, the Yoders claim that Honeywell is liable for Ms. Yoders' injuries because its trademark appears on the keyboard. Under § 400 of the Restatement (Second) of Torts, the Yoders assert that Honeywell is liable as the apparent manufacturer of the keyboard. Section 400 is entitled "Selling as Own Product Chattel Made by Another." This section imposes liability on "one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." The Yoders argue that where, as here, a corporation licenses another entity to use its trademark, the

corporation is liable for injuries caused by that product because it has held itself out as the manufacturer of the product.

The Yoders cite *Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134 (Pa. Super. Ct. 1987), and *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155 (Ill. 1979), in support of their contention that a corporation which permits a manufacturer or seller to use the corporate trademark on a product is liable for injuries caused by that product regardless whether the corporation did not itself manufacture, sell or distribute the product. In *Caterpillar,* the Pennsylvania Superior Court reversed the district court's grant of a directed verdict in favor of the defendant Caterpillar. There, plaintiff sought damages for injuries sustained when the forklift he was operating overturned. The court held that although Caterpillar was not a supplier or manufacturer of the product, because its name appeared on the equipment, others relied on the skill and reputation of the Caterpillar name when purchasing the product. Thus, the court rationalized that Caterpillar should be held to the same duty as the seller. *Id.* at 138-39. The case was remanded to the trial court for determination of Caterpillar's liability.

In *Connelly,* the plaintiff was injured by a tire bearing the defendant's trademark. The defendant had not manufactured or sold the tire. The Supreme Court of Illinois found that the apparent manufacturer doctrine applied because the parent corporation provided its subsidiary with the plans, specifications, and technical knowledge necessary to produce the tires, authorized the use of its trademark and received quarterly payments from its subsidiary. *Id.* at 162-63; *Hebel v. Sherman Equipment,* 442 N.E.2d 199, 204 (Ill. 1982).

Neither of these cases apply Colorado law. Moreover, both

are distinguishable. Contrary to the facts in *Caterpillar,* the Honeywell label is located inconspicuously on the bottom of the keyboard. There is no evidence that the purchaser of the keyboard or Ms. Yoder relied on the skill and reputation of Honeywell when purchasing or using the keyboard. Unlike the parent company in *Connelly,* Honeywell did not exercise any control over the manufacturing process of the keyboard at issue. Although the licensing agreement requires HIS to comply with Honeywell's quality control standards, the agreement did not require HIS to follow plans or product specifications, nor did it provide for Honeywell to be involved in the manufacturing process. In contrast with the evidence in *Connelly,* the Yoders proffer no evidence that Honeywell was in a position to eliminate the allegedly unsafe characteristics of the keyboard. Furthermore, a majority of the courts have rejected the theory that products liability should extend to corporations which have allowed their trademark to be used on a product which they did not manufacture, sell, or distribute. *Nelson v. International Paint Co.,* 734 F.2d 1084, 1088-1089 (5th Cir. 1984); *Affiliated FM Insurance Co. v. Trane Co.,* 831 F.2d 153, 155 (7th Cir. 1987); *Torres v. Goodyear Tire & Rubber Co., Inc.,* 867 F.2d 1234, 1236-37 (9th Cir. 1988); *Fletcher v. Atex, Inc.,* 861 F. Supp. 242, 245-46 (S.D.N.Y. 1994); *Seasword v. Hilti, Inc.,* __ N.W.2d __, 1995 WL 535079 (Mich. 1995).

There are no cases in Colorado which have adopted or rejected the Restatement (Second) of Torts § 400. Under Colorado statutory law, product liability is imposed on a "manufacturer" of the product. C.R.S. § 13-21-401. Section 13-21-401 defines manufacturer to include:

> [A] person or entity who designs, assembles, fabricates, produces, constructs, or otherwise

prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller who has actual knowledge of a defect in a product or a seller of a product who creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into his possession and before it is sold to the ultimate user or consumer. The term also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer. A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or controlled, in some significant manner, the manufacturing process of the product and the seller discloses who the actual manufacturer is.

The definition of manufacturer is both extensive and explicit. The intent of this section is to extend liability to those entities involved in the production of the product or otherwise in control the production process. The Yoders proffer no evidence that Honeywell manufactured, sold or distributed the product,

provided specifications for the production of the product, or exercised significant control over the production of the product. The final sentence of § 13-21-401 manifests the Colorado General Assembly's intent that where, as here, the corporation provides the trademark but has no role in the manufacturing process or the sale of the product, liability for injuries caused by the product will not be imputed to that corporation. The Yoders cite no authority in support of their assertion that "given the liberal approach Colorado has taken toward products liability law, it is reasonable to conclude that Colorado would adopt the Restatement provision if the opportunity arose." Accordingly, I conclude that, as a matter of law, Honeywell is not a manufacturer under § 13-21-401. Consequently, I grant the motion for summary judgment.

IV.

For purposes of a motion to dismiss, I accept all factual allegations as true and resolve all reasonable inferences in favor of the plaintiffs. *Tri-Crown, Inc. v. American Federal Sav. & Loan Ass'n*, 908 F.2d 578, 582 (10th Cir. 1990). A case should not be dismissed for failure to state a claim unless I determine beyond doubt that the plaintiffs can prove no set of facts which entitle them to relief. *Id.*

V.

There is no dispute that Colorado law governs resolution of the motion to dismiss. Under Colorado law, an action against a manufacturer of a product "shall be brought within two years after the claim for relief arises and not thereafter." C.R.S. § 13-80-106. "A cause of action for injury . . . shall be considered to accrue on the date both the *injury and its cause* are known or

should have been known by the exercise of reasonable diligence." C.R.S. § 1380-108 (emphasis added). Bull contends that at the latest, Ms. Yoder was aware of her injury and the cause of her injury on December 28, 1992, the date she filed her complaint. The amended complaint was filed March 15, 1995, more than two years later. Thus, Bull argues that her claim is barred under § 13-80-106.

The Yoders counter that under *Callaham v. First American Title Ins. Co.*, 837 P.2d 769 (Colo. App. 1992), their cause of action against Bull did not accrue until they knew it was Bull's product which caused their injuries. In *Callaham* the parties disagreed as to the applicable statute of limitations. The plaintiff argued that because the defendant's negligent conduct occurred before July 1, 1986, the six year statute of limitation was applicable to their cause of action. The Colorado Court of Appeals disagreed holding that "the critical factor by which to determine the applicable limitations period is when the plaintiffs had a claim to assert. * * * This limitations period does not begin to run until a plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the existence of facts forming the basis of a claim for relief." *Id.* at 771. At trial the jury determined that the plaintiffs' cause of action accrued on July 1, 1987, when they discovered or should have discovered the loss, damage or conduct giving rise to the injury. Therefore, the court held that the two year statute of limitations applied and barred the plaintiffs' action.

The Yoders rely on the court's statement in *Callaham* that "[a]lthough defendant's conduct which ultimately gave rise to plaintiffs claims occurred in 1985, there was no claim in existence prior to the time that plaintiffs discovered, not only the conduct or acts of defendant, but also discovered their

injuries and that *defendant's conduct was a cause thereof.*" *Id.* at 771-72. (emphasis supplied). The Yoder's reliance on this language, however, is misplaced. The court was simply emphasizing the fact that the plaintiffs' cause of action could not accrue until they knew they had sustained injuries caused by the wrongful act of another. *See Mastro v. Brodie,* 682 P.2d 1162, 1168 (Colo. 1984). The identity of the defendant was not at issue.

Bull correctly asserts that the statute of limitations begins to run when the injury and its cause are known. This is consistent with the language of the statute and the Colorado Supreme Court's holding in *Jones v. Cox,* 828 P.2d 218 (Colo. 1992) where the court held that "the statute of limitations begins to run from the date the physical injury and its cause were known or should have been known by the exercise of reasonable diligence." *Id.* at 220. The Colorado Court of Appeals addressed the issue of when a cause of action accrues where the identity of the defendant is not readily ascertainable in *Grogan v. Taylor,* 877 P.2d 1374 (Colo. App. 1993). At trial the court instructed the jury that:

> [The plaintiff's] [ ] claims against the defendant [ ] are deemed to accrue on the date both his physical injuries and their cause were known or should have been known to him or his attorneys by the exercise of reasonable diligence. However, it is not necessary for the defendant to prove that [the plaintiff] [ ] or his attorneys knew the specific acts of the alleged negligence by this defendant or others or that they knew the details of the facts necessary to prove the

> claims against this defendant or others. It is enough that the plaintiff or his attorneys knew, or may be reasonably charged with knowledge of, sufficient facts to be aware that a claim existed more than two years before it was filed. Id. at 1379.

The court held that the instruction properly embodied defendant's theory that the plaintiff's attorneys did not use reasonable diligence. Under Colorado law, therefore, the relevant inquiry is when the Yoders knew or should have known that Ms. Yoder's injuries were caused by her use of the keyboard.

The face of the complaint shows that Ms. Yoder knew her injuries were caused by her use of a keyboard on December 28, 1992. On January 23, 1993, Honeywell filed its answer denying that it manufactured the keyboard at issue. Honeywell's Answer, ¶ 10. At a Scheduling/Planning conference held August 17, 1994 Honeywell raised the issue of product identification. On December 7, 1994 representatives of plaintiff and Honeywell inspected the subject keyboards at the United Airlines Reservation Center in Denver, Colorado. The Yoders proffer no explanation why they did not inspect the keyboards at an earlier date or make other reasonable efforts to discover or confirm the identity of the manufacturer after filing the complaint and in light of Honeywell's answer denying that it manufactured the keyboard.

"The purpose of the statute of limitations is to promote justice, discourage unnecessary delay and forestall prosecution of stale claims." *Id.* at 224. As a matter of law, Ms. Yoder's cause of action accrued at the latest on December 28, 1992 when she knew she was injured and knew the cause of her injury.

Appendix B

According to the plain intent of the Colorado General Assembly, the Yoders then had two years to discover the keyboard manufacturer with reasonable diligence. No circumstances are shown here to give rise to any equitable tolling of the statute. Where, as here, the identity of the defendant could be discovered through reasonable diligence the action is properly barred if not filed within the two year limitation period. Because Mr. Yoder's loss of consortium claim is derivative in nature, it is also barred. *Covert v. Allen Group, Inc.*, 597 F. Supp. 1268, 1270 (D. Colo. 1984). Consequently, I grant the motion to dismiss.

Accordingly it is ORDERED that:

(1) Defendant Honeywell's motion for summary judgment is GRANTED; and

(2) Defendant Bull's motion to dismiss is GRANTED.

(3) This action is DISMISSED with costs awarded to defendants.

Dated: October 10, 1995 in Denver, Colorado.

BY THE COURT:

s/ Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 94-B-1256

Certificate of Mailing

A copy of this Amended Memorandum Opinion and Order was mailed to the following on Oct. 10, 1995:

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Appendix B

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APPENDIX C — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED FEBRUARY 19, 1997

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 95-1464

REGINA M. YODER, and LESTER L. YODER,

Plaintiffs - Appellants,

v.

HONEYWELL, INC., and BULL HN INFORMATION SYSTEMS, INC., formerly known as Honeywell Information Systems, Inc.,

Defendants - Appellees.

ORDER

Filed February 19, 1997

Before **SEYMOUR, LOGAN, PORFILIO, ANDERSON, TACHA, BALDOCK BRORBY EBEL KELLY, HENRY BRISCOE, LUCERO** and **MURPHY**, Circuit Judges.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all

of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ Audrey F. Weigel
Deputy Clerk